No. 176

FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 176.

GEORGE H. N. LUHRS, APPELLANT,

vs.

WILLIAM A. HANCOCK, LILLY B. HANCOCK AND THOMAS W. PEMBERTON, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of the Third Judicial District of Arizona, in and for the County of Maricopa, in an action brought by the appellant, George H. N. Luhrs, against the appellees, Hancock and Hancock and Pemberton, to recover possession of certain lots in the city of Phoenix, Arizona, being an action in ejectment

This suit was commenced by plaintiff Luhrs, February 1, 1896, against Hancock and wife, who were then in possession of the premises in controversy.

The dwelling house on one lot of the five in question having burned down, and Hancock and wife quit possession, defendant Pemberton was put in possession of the lots in question by the sheriff, March 5, 1896, and from that date to the present, has remained in sole possession of the premises, and is defending this suit on claim of superior title in himself.

The plaintiff Luhrs claims judgment in ejectment in this suit on title in him as follows:

In a suit by Herrick & Luhrs vs. W. A. Hancock, judgment was rendered against W. A. Hancock, March 5, 1892 (or, as shown by the record, judgment was rendered March 7th, as of March 5, 1892.) (Rec. pp. 56–57.)

April 5, 1892, execution was issued and levy made on this judgment. (Rec. p. 58.)

July 2, 1892, sale was made on this execution by John Montgomery, sheriff of Maricopa County, to plaintiff Luhrs, of all five of the lots in question. (Rec. p. 60.)

February 4, 1893, John Montgomery, as late sheriff, and as the sheriff who made the sale on execution, executed and delivered a sheriff's deed to plaintiff Luhrs, pursuant to the sale on execution. This is the sheriff's deed upon which we rely. (Rec. p. 61.)

It is true that on January 4, 1893, J. K. Murphy, the then sheriff of Maricopa County, who was not the sheriff who made the sale, executed and delivered to Luhrs a sheriff's deed. But that deed was invalid, because it was not made by the sheriff who made the sale, as we shall show in our brief herein.

The sheriff's deed from Montgomery, late sheriff, who made the sale, alone is valid, and on it the plaintiff relies for his title.

Defendant Pemberton relies for his title on a pretended deed made by defendant Hancock to his wife, Lily B. Hancock, February 27, 1886, while Hancock was claiming the real estate in question as a homestead. Mortgage by Hancock and wife to Robert Allstatter on all the lots, dated March 21, 1892 (sixteen days after the date of judgment under which plaintiff Luhrs purchased his title). Judgment on foreclosure of mortgage of Allstatter vs. Hancock and wife, rendered May 10, 1894, and sale thereunder to defendant Pemberton, August 11, 1894; and sheriff's deed to Pemberton, February 14, 1895, under which Pemberton was put in possession by the sheriff, as we have seen, March 5, 1896. (Rec. pp. 70 to 89.)

The above respective claims of plaintiff Luhrs and defendant Pemberton set out the real contest in this case.

The title to the real estate in question and the matters principally affecting the same are shown in evidence, and are briefly, as follows:

The common source of title claimed by both parties, is through the defendant Wm. A. Hancock. (Rec. p. 20.)

Hancock married in 1873. Went to live on Lots 14 and 15 of Block 77. Afterwards acquired lots 16, 17 and 18. House on lots 14 and 15. (Rec. p. 27.)

November 10, 1883. Wm. A. Hancock mortgaged to Ellis & Co. lots 15, 16, 17 and 18. Mortgage afterwards assigned to Herrick & Luhrs. (Rec. p. 41-42.)

December 17, 1883. Hancock and wife mortgaged lots 14, 15, 16, 17 and 18 to Herrick & Luhrs. (Rec. p. 42.)

September 21, 1885. Herrick & Luhrs commenced suit in District Court on both mortgages and notes. (Rec. p. 45.)

February 27, 1886. Hancock conveyed lots 14, 15, 16, 17 and 18 to wife, Lily B. Hancock. (Rec. p. 27-66.)

March 7, as of 5th, 1892 Judgment rendered vs. W. A. Hancock at suit of Herrick & Luhrs in District Court, Maricopa Co. (Rec. pp. 56-57-58.)

March 21, 1892. Mortgage, Hancock and wife to Robert Allstatter, on lots 14, 15, 16. 17 and 18. (Rec. pp. 34–67.)

April 3, 1892. Execution issued and levy made on Herrick & Luhrs' judgment on lots 14, 15, 16, 17 and 18. (Rec. p. 58.)

July 2, 1892. Sale on execution to Luhrs of lots 14, 15, 16, 17 and 18 on his judgment by John Montgomery, sheriff. (Rec. pp. 59-60)

January 4, 1893. Sheriff deed (J. K. Murphy, sheriff) to Geo. H. N. Luhrs, on sale of July 2, 1892. (Rec. pp. 63-64.)

February 4, 1893. Sheriff deed (John Montgomery, late sheriff) to Geo. H. N. Luhrs on sale of July 2, 1892. (Rec. pp. 61-62.)

April 4, 1894. Action commenced by Allstatter vs. Hancock and wife, Luhrs and Pemberton to foreclose mortgage of March 21, 1892. (Rec. p. 70.)

Both Luhrs and Pemberton answer, claiming liens prior to the mortgage by judgments, and suit dismissed as to them. (Rec. pp. 79-82-83.)

May 10, 1894. Judgment, Allstatter vs. Hancock and wife. (Rec. pp. 83-84-85.)

August 11, 1894. Sale to Pemberton on Allstatter foreclosure. (Rec. pp. 87-88-89.)

February 14, 1895. Deed to Pemberton on Allstatter foreclosure.

February 1, 1896. Luhrs commenced this suit against Hancock and wife, then in possession. (Rec. pp. 1-2.)

March 5, 1896. Pemberton put in possession under Allstatter foreclosure sale. (Rec. p. 27.)

March 3, 1898. Pemberton made a party to this action by amendment on order of the Court, and served with summons and complaint. (Rec. pp. 4-6.)

The testimony of Wm. A. Hancock, the principal witness in the case, is that at the time he made the deed to his wife Lilly B. Hancock, of the premises in question, he did not own any property exempt from execution.

"Q. Then at the time of making this deed to your wife in 1886 you didn't own any real or personal property, except the property you conveyed to your wife?

A. No, sir; none excepting what was exempt from execution."

(Testimony of W. A. Hancock. Rec. pp. 30-31.)

And at that time suit had already been commenced against Hancock by this plaintiff Luhrs to recover the debt for which this property was seized and sold to him on execution. (Rec. pp. 31-45.)

The property in question was not the homestend of the defendant Hancock at the time he conveyed it to his wife.

The statute of Arizona, as it stood February 27, 1886, the date of the deed from Hancock to his wife, provided (Compiled Laws, 1877, page 364, paragraph 2140): "The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, and the water rights and privileges pertaining thereto * * * not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale on execution, or any other final process from a Court, for any debt or liability contracted or incurred after thirty days from the passage of this Act, or if contracted or incurred at any time in any other place than this Territory."

Hancock testified, "I suppose I called it my home, yet I was not living there all of the time. I called it the homestead of my family, and I lived on the other side of the river a part of the time." (Rec. p. 31.)

The plaintiff offered to show by this witness that such land was not claimed by him as a homestead, but he was claiming a homestead under the Public Land Laws elsewhere, which however, was rejected by the trial Court, (Rec. p. 31.) and is elsewhere alleged as error.

The witness further testified that a part of the time his wife lived on the lots in question and a part of the time in California.

"I had a room in the house that I occupied sometimes and a part of the time it was rented." (Rec. p. 31.)

If the lots in question were claimed by Hancock as a homestead, he did not convey them to his wife in the manner in which alone a homestead could be conveyed under the Arizona Statute in force at that time. The Compiled Laws of 1877, providing (Paragraph 2141:) * * "But no mortgage, sale or alienation, of any kind whatever, of such land by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband." She failing to join in the deed with her husband.

Not only was the conveyance void as a conveyance under this statute but it was also void under the Common Law, which had, prior to the date of the deed, been declared in force in Arizona, it being a conveyance directly from the husband to the wife.

"The Common Law of England, so far as it is consistent with and adapted to the natural and physical conditions of this Territory and the necessities of the people thereof, and not repugnant to, or inconsistent with the constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the Courts of this Territory." Act No. 68, Session Laws of Arizona, 1885.

The answers of the defendants, in addition to their pleas of not guilty, and of title in themselves, set up the statute of limitations, but the District Court, which tried the case, and the Supreme Court of Arizona on appeal, considered only the question of the validity and effect of the deed of Wm. A. Hancock to Lilly B. Hancock, executed February 27, 1886, and to that this brief will be mainly devoted. Although it is well here to call attention to the offer of the plaintiff Luhrs, as a matter of defense to the title claimed by the defendant Pemberton, to show that Lilly B. Hancock, at the time of the execution of the mortgage to Allstatter under a foreclosure of which Pemberton claims title, was insane and incompetent to make such mortgage. Which offer was rejected by the trial court. (Rec. pp. 32-33-97-98.)

ASSIGNMENT OF ERRORS.

Comes now the appellant George H. N. Luhrs, and assigns, makes and files the following assignment of errors of the Supreme Court of the Territory of Arizona, in the above entitled cause in the record herein.

I.

The Supreme Court of Arizona erred in not finding that it was error for the trial court to admit in evidence, when offered by the defendant, over the plaintiff's objection, the deed from Murphy, as sheriff, to the plaintiff Luhrs, being defendant's exhibit No. 1, for the reason that the plaintiff was not claiming title under said deed in this action, and the same was not a valid deed.

II.

The Supreme Court of Arizona erred in not finding that it was error for the trial court to admit in evidence, when offered by defendant, over the plaintiff's objection, the deed dated February 27th, 1886, from W. A. Hancock to his wife, Lily B. Hancock, because the same is void as a conveyance for the following reasons:

First. It was and is void by the common law, which was in force in Arizona at the time of making of said deed.

Second. It was and is void because not made in accordance with, but contrary to, the Statute of Arizona at that time restricting the conveyance of homesteads.

Third. The evidence shows that said deed was made to Hancock to his wife for the purpose of defrauding his creditors by putting the title to the real estate therein described in her name and then claiming other real estate as his homestead, and his deed to her was, therefore, a fraud on his creditors and especially the plaintiff whose claim then existed against Hancock.

III.

The Supreme Court of Arizona erred in not holding and adjudging said deed to be void for the foregoing reasons.

IV.

The Supreme Court of Arizona erred in not finding that the trial court erred in refusing to allow the plaintiff on the trial to show by the defendant's witness, Hancock, also a defendant in this case, and by the record then offered in evidence, that he, Hancock, had, at the same time claimed, and was claiming, other lands than those in dispute herein as his homestead.

V.

The Supreme Court of Arizona erred in not finding that it was error in the trial court in refusing on the trial to allow the plaintiff to show the insanity of Lily B. Hancock, at and about the time that her husband, W. A. Hancock, executed the deed to her, in evidence.

VI.

The Supreme Court of Arizona erred in not finding that the trial court erred in refusing on the trial to allow the plaintiff to show by the Probate Records the insanity of Lilly B. Hancock at the time and prior to the time of the execution of the mortgage purporting to be by Hancock and wife to Allstatter, under which the defendant Pemberton claims title, and in receiving said mortgage in evidence.

VII.

The Supreme Court of Arizona erred in finding and holding that all the premises in dispute herein, were, on February 27, 1886, the homestead of the defendants, W. A. and Lilly B. Hancock.

VIII.

The Supreme Court of Arizona erred in not holding and deciding that the trial court erred in finding that defendant, W. A. Hancock, conveyed the property in dispute to his wife by the deed of March 6, 1886, as a settlement upon his wife, and that by said deed the title to said real estate vested in her, and that such conveyance did not impair the claims of any existing creditors and was not intended as a fraud on his creditors.

IX.

The Supreme Court of Arizona erred in not holding and deciding that the trial court erred in finding, as a conclusion of law, that the plaintiff did not have, at the time of the commencement of this action, any right, title or interest in the property in dispute herein.

X.

The Supreme Court of Arizona erred in not holding and deciding that the trial court erred in finding as a conclusion of law,

that the defendant, T. W. Pemberton, was, at the time of the commencement of this action, and at the date of such finding, the owner in fee of the premises in dispute herein and entitled to judgment declaring his title good and valid and debarring the plaintiff from asserting title thereto.

XI.

The Supreme Court of Arizona erred in not holding and deciding that it was error for the trial court to find and adjudge that the plaintiff has no right, title or interest in the premises in dispute because such findings by the trial court were unsupported by, and contrary to, the evidence and record herein.

XII.

The Supreme Court of Arizona erred in affirming the judgment of the trial court herein because the same was, and is, contrary to the evidence in the case and contrary to the law applicable thereto.

XIII.

The Supreme Court of Arizona erred in not reversing the findings and judgment of the trial court herein as contrary to the law and the evidence.

XIV.

The Supreme Court of Arizona erred in each and all of its findings and statements of facts, as shown by the evidence in the record herein.

XV.

The Supreme Court of Arizona erred in its findings, conclusions and judgments of the law herein, and such findings, conclusions and judgments were not supported by the record in this case.

XVI.

The judgment of the Supreme Court of Arizona is not supported by the facts or the law and should be reversed.

ARGUMENT FOR THE APPELLANT.

I.

The Supreme Court of Arizona erred in not finding that it was error for the trial court to have admitted in evidence the deed from Murphy, as sheriff, to the plaintiff, Luhrs, being defendants' Exhibit 1, for the reason that the plaintiff was not claiming title under said deed in this action, and the same was not a valid deed.

The plaintiff in this case is claiming title to the lots in dispute through a sale of the same to him on an execution issued upon a judgment of the District Court of Maricopa County, Arizona, which judgment was signed March 7, 1892, to operate as of March 5, 1892. (Rec. pp. 56-7-8.)

The sale on execution was made by John B. Montgomery, the then sheriff of Maricopa county, (Rec. pp. 59-60-61) and the deed thereon was made by said Montgomery, as "formerly sheriff of the county of Maricopa," on the 4th day of February, 1893, which deed appears at p. 61, of the Record.

It was under this deed alone that the plaintiff claimed title to the real estate, but the trial court permitted the defendants to offer in evidence another deed running to this plaintiff, dated January 4, 1893, made upon the same execution sale as the deed offered by the plaintiff, but made by Murphy, as sheriff. Murphy being the sheriff who succeeded Montgomery. (Rec. p. 26.)

To this offer the plaintiff objected, for the reasons, first, that he was not claiming title under this deed so offered, and, second, because this deed was invalid, not being made by the sheriff who made the sale.

The sheriff who made the sale, and not his successor in office, is the only proper person to make the deed to the purchaser at the execution sale.

There was then no statutory provision in this Territory requiring a succeeding sheriff to execute a deed on a sale made by his predecessor, and without such provision the common law rule must prevail, and the sheriff who made the sale must make the deed, notwithstanding he is out of office.

That this is the common law rule, see:

People vs. Boring, 8 Cal., 407, opinion of Field, C. J., p. 408, and cases there cited.

Our statute on redemptions requires the redemption to be made to "the officer who made the sale." Sec. 23, Act 20, Laws 1889. This is held by Field, C. J., in the case last cited, to mean "the sheriff who made the sale," and that the term officer is limited to the incumbent who performed the act of sale.

People vs. Boring, supra, 411.

Freeman, in his work on executions, lays down the rule in this language:

"Where the term of the officer who made the sale terminates, his power to make the conveyance continues. In fact, unless the new sheriff is specially authorized by statute he seems to have no authority whatever to make a conveyance based on a sale made by his predecessor."

Freeman Executions, Sec. 327.

Had the plaintiff in this case brought his action relying upon the deed made by J. K. Murphy, the succeeding sheriff, and dated Jan. 3, 1893, instead of on the deed executed by John B. Montgomery, the former sheriff, who made the sale, and dated Feb. 4, 1893, the defendant might well have objected to his title and the Court would have been justified in holding, as was held in California, "That where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale made by one sheriff, and deed executed by his successor, *held* that the plaintiff could not recover."

Anthony vs. Wessel, 9 Cal., 103.

A further answer to the defendant's claim as to the title claimed by the plaintiff in this action, is that the plaintiff is not claiming on, and has not offered in evidence, any other deed than the one of February 4, 1893; and it will hardly be held that the defendant in the case can force upon the plaintiff a muniment of title which is void, and under which he does not claim, and thereby defeat his action.

II.

The Supreme Court of Arizona erred in not finding that it was error for the trial court to admit in evidence when offered by defendant the deed dated February 27, 1886, from W. A. Hancock to his wife, Lilly B. Hancock, because the same was void as a conveyance.

First. It was and is void by the Common Law which was in force in Arizona at the time of the making of said deed.

Second. It was and is void because not made in accordance with, but contrary to the Statute of Arizona in force at that time restricting conveyance of homesteads, if the property were homestead.

Third. It was a fraud upon the creditors of W. A. Hancock and especially the plaintiff whose debt against Hancock than existed.

It will be observed that the judgment under which plaintiff Luhrs claims his title was dated March 5, 1892, sixteen days before the date of the mortgage from Hancock and wife to Allstatter, under which the defendant Pemberton claims his title. It therefore follows, as an inevitable conclusion of law, that if the judgment of Herrick & Luhrs vs. W. A. Hancock, of March 5, 1892, became a lien upon the lots in question, then the sheriff's deed to plaintiff on that judgment is superior title to the subsequent sheriff's deed to defendant Pemberton on the foreclosure of the Allstatter mortgage, dated after the Herrick & Luhrs judgment.

But defendants sets up in their answer, and claim in argument, that defendant Hancock, on February 27, 1886, while the premises in question were occupied and claimed by Hancock and wife as their homestead, made a deed direct to his wife, the defendant, Lilly B. Hancock, of the premises, by way of voluntary gift to her, and that thereafter the title was solely in the wife, so that the Herrick & Luhrs judgment of March 5, 1892, could not, and did not, attach as a lien. And they further set up and claim that the Herrick & Luhrs judgment of March 5, 1892, did not attach as a lien on the lots in controversy, because, they say, the premises in controversy were then, March 5, 1892, still the homestead of Hancock and wife. We emphatically deny the correctness of each and both these propositions of defendants.

We most confidently insist that the deed from W. A. Hancock to his wife was not only void as to his pre-existing creditors, because, if it conveyed or transferred any interest of Hancock in the property, then it was a fraud on existing creditors, and void as to them; but, so far as the deed from Hancock to his wife attempted to convey title to the alleged homestead to her, it was absolutely null and void.

We insist that if the contention of counsel for defenda s in

this case is correct as to the validity of this deed made by Hancock direct to his wife as a gift, then, under such construction of the statutes and laws of Arizona, it is easily within the power of a failing debtor in Arizona to convey an unlimited amount of real estate, by way of gift to his wife, in open fraud of his creditors, and thus cheat them out of their debts, and retain great wealth in real estate. The process would be simple and easy. Under the statutes of Arizona a homestead was made exempt from legal process and forced sale by the simple filing of a declaration of homestead by the husband as the head of a family upon land described, to the value of $4,000, as required by the statute. Such homestead may in like manner be released or abandoned by the husband by filing at any time thereafter in the recorder's office a declaration of abandonment, as provided in the statute. So if a husband, although insolvent, may make a valid gift direct to his wife of the homestead he has declared on today, so that she may hold the real estate as her own after it is abandoned or in any manner lost as a homestead, then he may in like manner, after he has deeded to her as a gift the first $4,000 worth of real estate, on which he has filed declaration of homestead, and she has recorded her deed to the same, the next day file his declaration of abandonment of homestead on the property deeded to his wife, and then immediately file a new declaration of homestead on a new piece of real estate worth $4,000, in like manner convey that to his wife by direct deed of gift, and so continue the process until he has covered up an unlimited amount of real estate, in open, bare-faced fraud of his creditors, and they are powerless to prevent.

This would be the necessary condition of affairs in this Territory if the Courts should hold the contention of defendants' counsel to be correct, that the deed from Hancock direct to his wife, by way of gift, conveyed to her the absolute title of the real estate comprised in the homestead, to be held by her thereafter as against Hancock's creditors and all the world, even after it was divested of its homestead character, simply because it may have been claimed as a homestead at the time he made the deed to her.

Such a construction and result, being so monstrous and intolerable, leads us to carefully consider where the fault in defendants' contention lies.

1. At common law a deed of real estate from the husband direct to the wife was void at law, without regard to whether it was for a homestead or not.

Tillaux vs. Tillaux (Cal., 1897), 47 Pac. R. 694.

The deed from Hancock to his wife was made February 27, 1886. In 1885 the Legislature of Arizona enacted that the common law was in force in Arizona. See Session Laws of Arizona, 1885, Act No. 68. Quoted p. ante.

The common law being in force then, in 1886, when this deed was made, a deed from a husband to his wife of real estate owned by him was absolutely void at law, unless there was at that time some statute in Arizona which abrogated the common law and permitted the husband to make a deed of real estate direct to the wife. No such statute existed in Arizona in 1886. In California there was a statute expressly abrogating the common law in that respect and permitting the husband and wife to make deeds of real estate directly to each other.

In all the States where common law was in force, it has been found necessary to enact a statute authorizing conveyances of real estate directly between husband and wife, as in California and Illinois, as shown by the decisions cited. And those statutes were of slow growth and are of comparatively recent enactment in all the States where the common law was adopted by statute.

We therefore repeat that in Arizona, while the Legislature in 1885 adopted the common law, it did not enact any statute abrogating the common law so as to allow a husband to make a deed of real estate direct to his wife, and no such statute existed in Arizona when this deed from Hancock to his wife was made, February 27, 1886; and it was therefore void in law without regard to the question of homestead in the premises, and cannot be set up in this suit at law as a defense.

2. A deed of the real estate comprised in the homestead by the husband directly to the wife while they still continue to occupy it as a homestead, and no change is made in the charater of the occupation or possession of the premises by them as a homestead, is null and void for any and all purposes, because such deed and conveyance is not made in accordance with the requirements of the statute of Arizona providing how homesteads shall be conveyed, and providing that conveyance made in any other manner is void.

The statutes of Arizona, and especially those in force in 1886, when this alleged conveyance was made, like those of the States on homesteads, are designed to exempt the home of the husband, wife and family to a reasonable limit of value from forced sale and process of all kinds, and preserve it to them as long as they occupy it as a homestead, and also further protect it by providing

that it may be sold and transferred only by the joint deed of the husband and wife, and that then the proceeds of it are also protected for reinvestment in another home.

But neither the statutes of Arizona, nor any State, on homesteads, design that they may be used by the husband or head of the family as a means of defrauding his creditors beyond the continuance of one specific homestead exempted.

The statute of Arizona, as it stood February 27, 1886, the date of the deed from Hancock to his wife, provided (Compiled Laws, 1877, page 364, paragraph 2140): "The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, and the water rights and privileges pertaining thereto * * * not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale on execution, or any other final process from a Court, for any debt or liability contracted or incurred after thirty days from the passage of this Act, or if contracted or incurred at any time in any other place than this Territory."

Paragraph 2141: * * "But no mortgage, sale or alienation, of any kind whatever, of such land by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband."

(The Court will bear in mind that the lots in controversy belonged to the husband, Hancock, and the title stood of record in his name until he made this pretended deed to his wife, February 27, 1886.)

A careful examination and analysis of the foregoing statute discloses that it, in plain and emphatic terms, prohibits and renders invalid any attempted mortgage, sale or alienation of any kind whatever of the homestead by the owner thereof, if a married man, except it be a bona fide sale or alienation of the real estate by the joint deed of the husband and wife, duly acknowledged by the wife, separately and apart from the husband. It does not authorize or contemplate any mortgage, sale or alienation in any other manner whatsoever. So it seems to us to plainly declare on its face, and by its terms, the absolute invalidity of a deed of homestead executed by the owner and husband alone to his wife. And such must be its reasonable and proper construction.

The naturally inherent invalidity of the deed from husband to wife, when the property is purely a homestead—the title being in

the husband, and being, outside the homestead, community property, as in this case—also occurs to us forcibly.

A deed from the husband to the wife under such circumstances —where no separation exists or occurs between the husband and wife, no change of the possession or of the character of occupation as a homestead jointly by the husband and wife takes place, and the property remains a homestead for the husband as well as the wife, and community property as before—conveys nothing, transfers nothing new to the wife, divests the husband of nothing, and invests the wife with nothing. In other words, it is not a transfer and conveyance of the homestead, as contemplated and provided for by the statute on conveyance of homesteads.

But we are not left to our own construction of this statute. It has recently been most thoroughly passed upon and construed, as we insist it should be, by some of the most eminent Supreme Courts in the Union.

In the State of Illinois the Supreme Court has very ably and exhaustively discussed this question in a long line of recent cases, coming down to that of Despain vs. Wagner, decided in November, 1896, and in every case has firmly held that a deed from husband or wife, having the record title to the homestead directly to the other, is invalid, null and void.

The statute of Illinois on conveyance of homestead, under which these cases were decided, is identical in substance with that of Arizona above quoted. It is as follows: "No conveyance of it shall be valid unless it is in writing, subscribed by said householder, and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance."

See statute quoted as above in Despain vs. Wagner, 163 Ill., 601. In that case the wife had the title to the real estate comprised in the homestead, and while she and her husband were occupying it as a homestead, the wife made a deed of it directly to the husband. After the death of the wife—leaving no children—her heirs at law filed a bill against the devisees of the deceased husband to set aside the deed of the wife to the husband, of the homestead. The Supreme Court declares, in deciding the case:

That "a deed is not invalid merely because it is made directly by the wife to the husband, as, under the statutes of the State, a conveyance by a husband directly to his wife, or by the wife directly to her husband, is valid so far as to vest all the title capable of being transferred by the instrument of conveyance."

The Court quotes the statute as quoted above, and say that the statutory requirement as to conveyance of homestead must be held to apply to deeds made by householders to their wives, and that a conveyance of the homestead not exceeding $1,000.00 in value (the limit of value in that State) by a householder to his wife, she not joining therein, is inoperative to pass the title to the homestead estate, and the Court further says: "It must be accepted as the settled law of this State, that a deed to a homestead by the householder, even to his or her wife or husband, not subscribed and acknowledged by such wife or husband (possession not being abandoned or given pursuant to the conveyance) is a nullity," and the Court held in the case that the deed from the wife to the husband, though valid so far as it conveyed the excess in value over $1,000.00, the limit of homestead value, was a nullity so far as it attempted to convey the homestead estate, not exceeding $1,000.00. And the Court held that the fee title of the homestead remained in the wife at her death, notwithstanding her deed to her husband, and descended to her heirs at law. And the opinion of the Court cites and reaffirms the following cases:

Anderson vs. Smith, 159 Ill., 93.
Haggerty vs. Haggerty, 149 Ill., 655.
Barrows vs. Barrows, 138 Ill., 649.
Kitterlin vs. Milwaukee Mechanics Ins. Co., 134 Ill., 647.

In the last cited case the Court, after quoting the statute says:

"We said in Browning, et al., vs. Harris, et al.: 'Since the homestead in such a case (where the total value does not exceed $1,000) comprises the entire interest (of the householder in the premises), it follows that any conveyance by the owner which does not conform to the requirements of the statute with respect to the conveyance of homesteads, will be inoperative and void as to such homestead.' And it was further said: 'The Legislature having, in plain and unmistakable terms, declared that certain forms and ceremonies shall be observed in the conveyance of a homestead, Courts have no power to dispense with them. On the contrary, it is their manifest duty to enforce their observance.' And the Court further said in their opinion: 'For wise and humane reasons, to preserve to the debtor and his family a home and shelter, the estate is, by express enactment, secured to the husband and wife, and no waiver, release or conveyance of it can be valid that is not, by their joint voluntary act and consent, expressed in manner and form prescribed in the statute. We are

not at liberty to defeat, by construction, the plain and clearly expressed will of the Legislature, nor to dispense with the safeguards it has provided against the improvident alienation or relinquishment of the estate. The husband, who is the owner of the title to which the homestead attaches, cannot, by any act of his own, waive, release, relinquish or convey the homestead; unless abanboned, or alienedd, or released by the joint act of himself and wife in the mode prescribed, it continues, despite any act or deed of his, for the benefit of himself and family during his life, and for their benefit after his decease. Nor does it affect this conclusion, that the children of the householder cannot be said to have a vested interest in the estate during his life. True, the interest of the children is under the control of the parents, and may be defeated by them before vesting in the children; but it can only be done in some one of the modes prescribed by the statute. Nor does it affect this consideration, that the conveyance is, here, to the wife.' * * * But it is unnecessary to pursue the discussion further. The Legislature has said, in unambiguous language, that such deeds are without validity. The premises, or any interest in them, being incapable of severance from the estate of homestead therein, and the deed from Kitterline to his wife being without validity as a conveyance of the homestead estate, effected no change of title. Being void, the title of Kitterline was unaffected thereby."

Such is the thorough, strong and irresistible reasoning and conclusion of the Supreme Court of Illinois upon the exact question, and under a statute exactly to the same effect as the statute of Arizona, at the time Hancock made this deed of the homestead to his wife, as we have shown. And the Court will bear in mind that the evidence in the case at bar shows that all these lots claimed in 1886 by Hancock as a homestead, and as such attempted to be conveyed by him to her by deed direct, were at that time worth much less than the $5,000 fixed as the limit of value for homesteads, and, therefore, the homestead alone was comprised in the deed. But we are not required to rely alone upon this very strong and unbroken line of decisions in Illinois, conclusive as they are, to establish our contention that the deed from Hancock to his wife of these premises, being then a homestead, was absolutely null and void.

The same doctrine is announced in Massachusetts, in Cannon vs. McMurray, 2 Allen, 202; Castle vs. Palmer, 6 Allen, 403. Also in Thompson on Homesteads and Exemptions, Sec. 474, where the author says: "Where the statute provides that, in

order to make a valid conveyance of the homestead, the wife of the owner must join in the deed, a conveyance of the homestead by the husband alone is held by most Courts to be *void*, not only as to the wife, but also as to the husband." And in a foot-note to the text, cites, to sustain it, cases from Michigan, Iowa, Massachusetts, Kansas, Tennessee, Texas, Wisconsin and California. In Barber vs. Babel, 36 Cal., 31, cited, the Court there says, speaking of the statute providing the only mode of conveyance of the homestead where once established: "The question of policy is one for the Legislature alone, as the representatives of the people. It is no part of our duty to throw obstacles in the way of the operation of the law, or to seek, by construction, to frustrate the policy adopted; but on the contrary, our duty is to carry out its provisions in good faith, according to the true interest and spirit of the law, as gathered from its provisions, when read by the light of surrounding circumstances. And, under its provisions, we are of opinion that there is a joint estate, or interest, in the homestead, vested in the husband or wife, which can only be divested by the concurrent act of the husband and wife, so long as she continues a resident of the State, and that this interest can no more be affected without her concurrence in the mode prescribed, than the ordinary estates in the lands of others without the concurrence of the parties holding them."

So, we say with perfect assurance and confidence, that the deed from Hancock to his wife, of February 27, 1886, relied on by all these defendants, was absolutely null and void, and the fee title of the premises remained in Hancock to these lots, just as if he had not made this deed to his wife. What then follows?

HANCOCK AND WIFE LOST HOMESTEAD IN THE PREMISES.

Hancock and wife having failed to claim a homestead, or any exemption, under the statute in force when this judgment was obtained and execution levied, cannot now, nor can their grantee, set it up to defeat the plaintiff's title.

Our statute on homestead exemptions, in force when this action was tried, was enacted March 10, 1887, Title XXXIII R. S., and requires, as an absolute prerequisite to the exemption, a declaration in writing, verified, filed and recorded in the office of the County Recorder. It is admitted that no such declaration has ever been made, and that five years elapsed from the passage of the Act until the rendition of the judgment in the levy and sale under which the plaintiff claims, i. e., from March 10, 1887, to March 7, 1892.

Did the homestead, acquired by Hancock and wife prior to 1887, by reason of their residence on a portion of these lots, continue after 1887, notwithstanding their failure to comply with the law? If it did, then the Court must legislate into the statute of 1887 a clause which does not appear therein, and reading about as follows: "Provided, however, that all homesteads, heretofore acquired by residence, shall continue to be exempt without any declaration whatsoever, as though the foregoing provisions of this statute never had gone into effect."

Under the California homestead act of 1851, residence and occupation, as a home for the family, was all that was required to render land exempt up to a certain value. In 1860 and 1862 the homestead law was so changed as to require, in addition to residence, a declaration in writing, filed and recorded substantially, as by our statute of 1887, as well as residence.

The question then arose in that State, as to whether the effect of the amendment was to release the homestead acquired under the old law and totally deprive the debtor of a homestead already acquired, unless he made the newly required declaration, and it was held: "That homesteads, acquired under the Act of 1851, lose the character of homesteads and become liable to forced sale on execution, unless the declaration provided for in the Act of 1860, is made and filed," and this, notwithstanding continued occupying as a home.

Noble vs. Hook, 24 Cal., 638.
Estate of Reed, 23 Cal., 410.
Bartholomew vs. Hook, 23 Cal., 278.

"Nothing can make the premises a valid, protected homestead without such a declaration as the statute requires."

Bareham vs. Bryan, 23 Pac., 212.

"Nor can it be claimed that vested rights were interferred with by the passage of our homestead law of 1887. This claim was made in California under the law of 1860, and dismissed by the Supreme Court of that State."

Noble vs. Hook, 24 Cal., 638 (640).

"The homestead exemption is a privilege, a matter of grace or favor, and not a vested right."

Sparger vs. Compton, 54 Ga., 359.

The privileges extended to debtors by existing exemption laws are not, as to the particular property which comes within

their protection, vested rights. The Legislature may modify these laws by general enactment, affecting all debtors alike.

Bull vs. Conroe, 13 Wis. (233).

It will be observed that five years elapsed from the passage of this later homestead act to the taking effect of Luhrs' judgment, and no attempt was made by Hancock or his wife during all that time to avail themselves of its benefits. So no argument can be based on the fact that no reasonable time was given them to comply with the terms of the new law, which, by its terms, went into effect on its enactment.

3. The deed from Hancock to his wife was also void as a fraud upon his creditors, and especially this plaintiff, whose claim then existed against Hancock.

If it could possibly be said under the evidence in this case that Hancock had any interest in these lots at the time he made the deed to his wife, outside of, or over and above, the homestead, which he could convey by direct deed to her, then such interest, if any, in addition to or over and above the homestead, was conveyed to her in fraud of his creditors and with intend to defraud them, when, as the evidence shows, Hancock was wholly insolvent and all his property, except this homestead, was in the hands of an assignee and insufficient to pay his debts. Under such circumstances he could not make a deed of any property direct to his wife without its being void as to his creditors.

In ejectment, where one party relies upon title derived through a deed made by husband to wife as a gift, when the husband did not at the time retain sufficient property to pay existing debts, a sale of such land upon execution by a creditor, whose debt existed at the time the property was deeded to the wife, and deed under such sale, will prevail against the title so derived through the wife.

Terry vs. O'Neal & Son, 71 Tex., 594.
Belt vs. Raguet, 27 Tex., 481.

Where a husband conveyes property to his wife to defraud creditors, it is immaterial to the rights of the creditors whether the wife participated in the fraud or not.

Knapp vs. Day, 34 Pac., 1008.

When a husband conveys property to his wife, the moving cause being to place it beyond the reach of his creditors, it will be subjected to judgments against him.

Ryan vs. Meyer (Mich.), 66 N. W., 667.

In a voluntary conveyance by way of gift by a husband to his wife, in fraud of creditors, it is immaterial whether the wife knew of, or participated in the fraudulent intent of the husband, it is void.

Wilson vs. Spear, (Vt.), 34 A., 429.

Where the husband conveys property to the wife, as against existing creditors, the burden is on the wife to show that the transaction was not fraudulent as to creditors.

Claflin vs. Ambrose, 19 So., 628.
Manning vs. Carmithers, 34 A., 254.
Noyes vs. Harrison, 23 S. E., 560.
Seasongood vs. Ware, 16 So., 51.

To render a voluntary conveyance by a husband to his wife valid as against prior creditors, the burden of proof is on the grantee to show that the debtor retained sufficient property to pay his debts.

Hoffman vs. Nolte, (Mo.), 29 S. W., 1006.

A conveyance by an insolvent debtor to his wife is presumptively fraudulent as to such creditors, and the burden is on the one claiming through it to prove the contrary.

Glass vs. Zutavern (Neb.), 61 N. W., 579.

It must be conceded now that we have established our proposition that the judgment of Herrick & Luhrs vs. W. A. Hancock, March 5, 1892, was at once a lien on the lots, and the sheriff's sale and deed thereunder to plaintiff Luhrs established a good title in him to the lots in controversy, and the sheriff's deed, on which we rely for title, was the only proper and *valid sheriffs deed.*

The Supreme Court of Arizona erred in sustaining the action of the trial court in refusing to allow the plaintiff to show that at the time the defendant Hancock was claiming the land in question as a homestead he was claiming other lands as a homestead.

On the trial of the cause, the plaintiff, to rebut the claim of the defendant, W. A. Hancock, that the lands in question were a homestead, asked said Hancock, who was then on the stand:

Q. Did you make application for a homestead from the gov-

ernment of the United States for land on the other side of the river?

Defendant objected to the question as incompetent. Objection sustained.

Plaintiff offers to show by this witness that on the 19th of June, 1888, witness made his application for a homestead to the government of the United States for the Northwest ¼ of Section 2, Township 1 N., Range 3 E., and filed his application in the United States land office at Tucson at the time. That he afterwards completed his homestead proofs and received from the government of the United States the certificate of the receiver of the land office for that piece of land as his homestead, and offered in evidence a certified copy of that application, his affidavit in support of the same, and all the proofs made by him on the application.

Defendants object to the offer to prove as incompetent, etc. Objection sustained, and plaintiff excepted. (Rec. p. 97.)

It seems to the appellant that this error is so patent that no citation of authority is needed to sustain it. Certainly a man cannot claim or have two homesteads at the same time. Neither can the exemption laws be so extended that a married man can have a homestead in one part of the county and his wife one in another. And had the plaintiff been permitted to make the showing he offered to make by this witness, it can readily be seen that it would have gone far toward disproving the defendants' claim to the property in dispute as a homestead, and so entirely overturning the claim of the defense and the entire theory upon which the Supreme Court affirmed the judgment of the court below.

The Supreme Court of Arizona erred in not finding that it was error in the trial court to refuse to allow the plaintiff to show the insanity of Lilly B. Hancock at and subsequent to the time her husband, W. A. Hancock, executed to her the deed upon which the defendants rely.

It cannot, with any degree of fairness or truth, be presumed that Wm. A. Hancock, by his deed to his wife for this property, intended it as a "*settlement*" upon her for her benefit. His wife was at that time insane, and had been for sometime before, as we offered to show by evidence. We offered in evidence the records of the Probate Court of Maricopa County, to show that on the 23d of March, 1886, less than a month after the deed was made

to her, she was adjudged to be insane by a decree of the Probate Court, and we offered to prove that she had been insane for a long time before that. This evidence was excluded by the Court, and plaintiff excepted. The evidence was competent and should have been admitted; for, if the evidence showing she was insane at the time had been admitted, as it should have been, it would have been impossible to fairly presume that Hancock was honestly making a settlement of this real estate upon his wife, by his deed of conveyance direct to her, when she was insane, and incapable of lawfully accepting the deed of settlement, or of disposing of the property for her benefit. Under such circumstances, if honestly intended as a settlement upon and for the benefit of his wife, he would have conveyed it to a trustee, who could have handled it and conveyed the title for her benefit. It was clearly error not to admit this evidence of her insanity at the time, and for the purposes of this argument it must be considered as having been admitted.

Another and further reason why this testimony should have been admitted is that the title and all the title of the defendant, Pemberton, who is adjudged by the decree in the case to be the owner of the property, comes through a mortgage made subsequent to the plaintiff's judgment lien, and it necessarily follows that if Mrs. Hancock was insane, as the plaintiff offered to show, she was incompetent to make this mortgage, and Pemberton, therefore, took no title whatsoever. This error is fully set forth in the Record. Specific offers were made by the plaintiff to prove this insanity (Rec., pp. 33-97-98) and the plaintiff also objected to the offer of the mortgage under which the defendant claimed title because Lilly B. Hancock was insane and incompetent to execute it. (Rec., p. 34.)

Our Assignment of Error X is specifically directed to this portion of the decree, and, unless the defendant Pemberton did show a valid title from Mrs. Hancock, the decree is certainly erroneous, and a new trial should have been granted for the error of the trial court in refusing to allow the plaintiff to show her incompetency to convey at any time after she obtained her alleged title from her husband.

The Supreme Court of Arizona erred in its holding that all the premises in dispute herein were on February 27, 1886 the homestead of the defendants, W. A. and Lilly B. Hancock.

This holding, upon which the Supreme Court of Arizona bases its decision of this case, is made without discussion or examination of the evidence and seems to be based entirely upon the finding of the trial court, regardless of the facts. It is settled by the Supreme Court in one short sentence: "The property was at the time the homestead of the Hancocks; such was the finding of the trial court, based upon ample evidence," and this is the entire review which the facts of this case received on the appeal. The same evidence is before this court that was before both the Arizona courts, and we claim that it is neither ample nor satisfactory in establishing the homestead character of these lots and all of them at the time Hancock made his deed to his wife—1886. The evidence on this point is very brief and is mainly contained on p. 28 of the Record, Hancock there testifving that he lived on the lots in 1886 and had done so since 1873 with his family, that their value was $3,000 to $3,500, that his family was there and he was there most of the time; that it was his home and his family's home. Yet on cross examination the witness says he was not living there all the time; he called this the homestead of his family while he lived "on the other side of the river" a part of the time. That his wife was there a part of the time and a part of the time in California; that sometimes he occupied a room there and sometimes it was rented (Rec., p. 31). Now we submit that this is extremely unsatisfactory evidence upon which to establish a claim to homestead to all these lots, five in number, under the homestead laws of Arizona in force in 1886, and which have been hereinbefore quoted.

There is no evidence in this case that the lots in question were within the definition of a homestead "consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, * * * not exceeding in value the sum of $5,000." There is absolutely nothing in the evidence to show upon which of these lots the dwelling-house, or its appurtenances, if there were any, was situated; and while Hancock probably did have a homestead right in such of the lots as were covered by the dwelling and its appurtenances, this right could not be extended over all adjoining lots he might have then owned, without some further proofs than were made in this case. The test under a statute similar is said to be use and value.

"The premises are such and only such as the parties are residing on and using as a homestead."

Gregg vs. Bostwick, 33 Cal., 220.

Having thus considered the errors in the record, which entitle the plaintiff and appellant to a reversal of this judgment, we desire briefly to consider also the argument of the defendants and appellees upon these and other branches of the case, not touched upon in the decison of the Supreme Court of Arizona.

STATUTE OF LIMITATIONS.

All the defendants set up in their answers that the defendant, Lilly B. Hancock, was in the adverse possession of the lots in question under the deed from her husband, since February 17, 1886, and until defendant Pemberton got possession, March 5, 1896, and that, therefore, our action is barred by Section 2297, Revised Statutes of Arizona, which is as follows:

"Every suit, to be instituted to recover real property, as against any person in peaceable and adverse possesion thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards."

Our answer to this point of defendant is clear for several reasons.

First. As we have seen, the deed from Hancock to his wife was utterly null and void for all purposes, and was not therefore title or color of title in Lilly B. Hancock.

Second. The possession of the husband and wife in joint occupancy of premises as a home is presumed in law to be the possession of the husband.

Collins vs. Lynch, (Pa.), 27 A. T., 721.

Third. The possession of Hancock and wife after the Herrick & Luhrs judgment, March 5, 1892, against Hancock *was not adverse* possession as against the purchaser of the premises at sheriff's sale and the holder of the sheriff's deed thereunder. Hancock and wife having lost their homestead right therein by failure to declare it, as required by the statute of 1887.

"Where the property conveyed to the wife as a gift was then, and continued to be, in the possession of the husband and wife, such continued possession will not be adverse possession of the wife as against creditors defrauded, so as to ripen the title of the wife, under the statute of limitations, as against the creditors."

Belt vs. Raguet, 27 Tex., 481.

The continued possession of the judgment debtor, whose land has been sold under execution, is not adverse to the title of the purchaser at the sheriff's sale.

Cook vs. Norton, et al , 48 Ill., 22.

Referring to the chronological table at the beginning of this argument, and bearing in mind the evidence in this case, the Court will find that the Sheriff's sale on the execution in the judgment of Herrick & Luhrs vs. W. A. Hancock was made on July 2, 1892, by John Montgomery, sheriff. At that time W. A. Hancock and wife were in possession of the premises and residing there.

February 4, 1893, John Montgomery, as ex-sheriff, made his sheriff's deed to plaintiff Luhrs. Hancock and wife were then in possession and residing on the premises.

February 1, 1896, Luhrs commenced this action against Hancock and wife, who were still in possession and residing on the premises.

That Hancock remained in possession until March 5, 1896, when Pemberton was put in possession under a sheriff's deed to him, dated February 14, 1895, on the judgment of foreclosure of the mortgage of Allstatter vs. Hancock and wife. Judgment dated May 10, 1894, and sale thereon August 11, 1894.

So it is readily seen that from the time of the sheriff's sale to March 5, 1896, Hancock and wife were in possession of, and lived on, the premises, but had no homestead rights or exemption in the same, not having filed declaration of homestead, as required by the statute of 1887, and their possession during that time is held by all courts, and must be held here, as the possession of W. A. Hancock, the judgment debtor in the judgment of Herrick & Luhrs vs. Hancock.

As we have seen from the authorities above cited, the possession of the premises by the judgment debtor, after sale on execution, *is not*, and cannot be, *adverse* possession, as against the purchaser at the judgment sale. Neither can such possession by the judgment debtor and his wife be such adverse possession as is required by the statute, nor can it ever ripen into a title by limitation.

The language of the statute is clear and plain, and it will not avail for defendants' counsel to argue, as he did in the court below, that the statute ran from the time the plaintiff might have taken his sheriff's deed. His right of action in ejectment does not

"accrue" until he has a deed which gives him the right to commence his suit.

Jefferson vs. Wendt, 51 Cal., 573.

Weiser vs. McDowell, 61 N. W., 1096.

The only remaining defense sought to be set up in this case is that of

RES ADJUDICATA.

This defense is not available to the defendants for many reasons.

In their answers defendants all set up that on September 21, 1885, Herrick & Luhrs commenced suit in the District Court of Maricopa County against Wm. A. Hancock and Lilly B. Hancock on two separate notes and mortgages, one dated November 10, 1883, and made by Wm. A. Hancock to Gus Ellis & Co., the mortgage describing only lots 15, 16, 17 and 18, which was assigned to Herrick & Luhrs; the other note and mortgage dated December 17, 1883, made by Hancock and wife direct to Herrick & Luhrs, and describing in the mortgage all five of the lots in question, and that in that suit Hancock and wife filed answers setting up that when Wm. A. Hancock executed the first of said mortgages without his wife joining him, November 10, 1883, the lots therein described were the homestead of the defendants, Wm. A. Hancock and Lilly B. Hancock, and that, therefore, the mortgage made by Hancock alone was invalid as a lien on them. And the answer of defendant Pemberton in the case at bar alleges, "that in said action the issue was tried between this plaintiff and the said defendants, William A. Hancock and Lilly B. Hancock, as to whether said property was the homestead of the said Wm. A. Hancock and Lilly B. Hancock, his *wife at the time of making said mortgage and at the time of the commencement of said action*," and that upon the issue so raised, the Court in said action decided and determined "that the lands described in this complaint *were at the time of making said mortgage, and at the time of the commencement of said action*, the homestead of the said defendants, Wm. A. Hancock and Lilly B. Hancock," and that said decision is still in force, and is, therefore, *res adjudicata*.

Now, in the first place, the allegations of the defendants' answer as to the facts about the judgment in that former case are not borne out by the record and evidence in this case. The judg-

ment roll in the case of Herrick & Luhrs vs. Hancock et al., was introduced in evidence in this case, and shows:

1. That the only parties to that case were Herrick & Luhrs, plaintiffs, and Wm. A. Hancock, Lilly B. Hancock and Chas. A. Tweed, assignee of Wm. A. Hancock, defendants.

2. That the case was tried three times before the District Court of Maricopa County, and that on the first two trials the judgment rendered by the Court and contained in the judgment roll, expressly held and decided against the claim of homestead in the premises by Hancock and wife, and

3. That on the third and last trial of that case, the judgment as contained in full in the judgment roll, says nothing whatever about the claim of homestead in Hancock and wife. It simply renders judgment in favor of the plaintiff on both the notes in suit and foreclosure of the mortgage made by both Hancock and wife. The judgment nowhere finds or mentions anything about a homestead in Hancock and wife at any time, and does not decide that they had a homestead in the premises at the time of the making of the first mortgage, or at the time of the beginning of the suit, or at any other time. For all that appears in the judgment, the plaintiffs at the third trial may not have asked or urged a judgment of foreclosure on the first mortgage (Rec., p. 56). No homestead was decided to be in Hancock and wife, so far as the judgment shows, and no extrinsic or oral evidence *de hors* the record was offered by the defendants on the trial of the case at bar, to show that the question as to whether the premises were the homestead of Hancock and wife, was in fact decided by the Court in the final judgment in the said case of Herrick & Luhrs vs. Hancock et al. For this reason alone, then, no *res adjudicata* is established. This is made clear by the following case:

Jones vs. Beaman (N. C. 1895), 23 S. E. Rep., 248.

See also to the same effect:

Dygert vs. Dygert (Ind.), 29 N. E., 490.

Stone vs. St. Louis Stamping Co. (Mass.), 29 N. E., 643.

But there is another point against defendants' plea of *res adjudicata*, which is clearly, absolutely conclusive, even if it should be considered or "conjectured" that in the case of Herrick & Luhrs vs. Hancock et al., in the final third trial of that case, as

is alleged in the answer of Pemberton, in this case, the "Court decided and determined, and rendered its judgment accordingly, that said lands described in this complaint were *at the time of making said mortgage, and at the time of the commencement* of said action, the homestead of the said defendants, William A. Hancock and Lilly B. Hancock," that is wholly immaterial in this case, and wholly ineffectual to establish *res adjudicata* in favor of the defendants.

The "time of the making of the mortgage" in question in that suit was November 10, 1883. The "time of the commencement of said action" was September 21, 1885.

The time of the commencement of the present action was February 1, 1896, and the date of the Herrick & Luhrs judgment against Hancock was March 5, 1892, or more than six and a half years after the time when Hancock and wife had a homestead in the premises, as said to have been found by the judgment of the Court in the former suit, as alleged by the answers of the defendants herein. A judgment by the Court in a former suit that Hancock and wife had a homestead in the premises November 10, 1883, the date of the mortgage in the other suit, and also September 21, 1885, the date of the commencement of the suit of Herrick & Luhrs vs. Hancock et al., can by no means be construed as a judgment of the Court that Hancock and wife had a homestead exemption in the lots in controversy on March 5, 1892, the date of the judgment against Hancock, on which our sheriff's deed is based, nor that such homestead exemption existed February 1, 1896, when plaintiff commenced this suit in ejectment.

"An adjudication of right of homestead is only an adjudication of that right up to that time, and is not an adjudication of the status at some subsequent time."

Plummer vs. White, 101 Ill., 474.

It might well be that Hancock and wife had a homestead exemption in a part of the premises September 21, 1885, under the law as it then stood; but as statute laws, as well as individuals, are subject to frequent changes, it would be a very violent presumption to say that because they had a homestead in these certain lots then, therefore they had a homestead in them seven years thereafter. In fact, our theory of this case is that Hancock and wife had a homestead in a part of the lots in controversy on the date of Hancock's mortgage, November 10, 1883, and on the date of the commencement of the Herrick & Luhrs suit, and

retained that homestead until the Act of the Legislature of Arizona went into force in 1887, requiring them, in order to preserve their homestead in the lots, to file a declaration of homestead upon them, as provided in that Act; and not having done so, they lost their homestead exemption in these lots, and that no homestead exemption on these lots existed in their favor at the date of the judgment of Herrick & Luhrs vs. Hancock, March 5, 1892, and that none existed in them at the time of the judgment sale on execution, or of the sheriff's deed to us, or at the time of the commencement of this suit.

The Court will also please remember that W. A. Hancock was a witness on the trial of the case at bar, and testified that neither he nor his wife had ever filed any declaration of homestead upon these lots, as required by the statutes of 1887.

The rule of *res adjudicata* is stated by the highest authorities as follows:

To make a matter *res adjudicata* there must be a concurrence of

1. Identity of the subject matter.
2. Identity of the cause of action.
3. Identity of the persons and parties.

Freeman on Judgments, 3d Ed., 252.

Philipowski vs. Spencer, 63 Tex., 607.

The defendants in this case have not brought themselves within this rule in any of its particulars.

The parties in this case are not the same as in Herrick & Luhrs vs. Hancock et al. Pemberton, who is the chief and only defendant in interest in this case, was not a party to the former suit.

The rights to be decided in this ejectment suit between plaintiff Luhrs and defendant Pemberton, on their respective claims of title, could not have been decided in the former suit, and, therefore, there is here no "identity of the persons and parties."

There is here no "identity of the cause of action." The cause of action in Herrick & Luhrs vs. Hancock et al., was on a note and mortgage, made November 10, 1883, by Hancock, and there was judgment on the note, but no foreclosure of the mortgage, and, so far as the mortgage is concerned, was simply a question as to whether that mortgage, made by Hancock alone, was a valid lien on the property therein described, and, at best, the

Court could only have decided that it was not a valid lien. Here the cause of action is based on a sheriff's deed to plaintiff Luhrs, dated February 4, 1893, based upon a judgment against Hancock, March 5, 1892, and a sheriff's sale thereunder of the lots in controversy, and is an entirely different cause of action.

There is here no "identity of the subject matter," as required by the rule.

Even if it be conceded that the issue was in Herrick & Luhrs vs. Hancock et al., whether a mortgage made by Hancock alone upon the lots in question, the same being then a homestead, was a valid lien upon them, and even if the Court had decided that issue and held that the lots were a homestead at that time, and that, therefore, the mortgage was invalid, still that is not the issue here.

If the lots in controversy are regarded as the subject matter of this suit, then the subject matter of this suit is not identical with the subject matter of the other suit, for lot 14 was not in the Hancock mortgage, and was not involved in that controversy.

But suppose the judgment roll in the foreclosure case of Herrick & Luhrs vs. Hancock et al., did show that the question of homestead in the lots in controversy was there litigated and determined, or suppose that fact had been shown by extrinsic proof, which it was competent to do, what would it amount to in this case?

The only question which the Court could have litigated or determined in that case was whether, *at the date of the mortgage*, made by William A. Hancock to Gus Ellis & Co., the premises therein described were the homestead of Hancock and wife.

That is, were these lots such homestead November 10, 1883, when Hancock alone made the mortgage to Gus Ellis & Co.? If so, then the mortgage was not a lien upon the lots. That is all the Court could have determined in that case.

The Court in that case had nothing to do with the question as to whether Hancock and wife had a homestead in the lots at the time that suit was commenced, or at any other time subsequent to the making of the mortgage, November 10, 1883.

At the best, the Court could only have possibly decided that Hancock and wife had a homestead in the premises November 10, 1883, the date of the mortgage, and, therefore, the mortgage was not a lien on the premises. But, as we have already shown by authorities cited, a judgment that a homestead existed in the lots November 10, 1883, was not a judgment that such homestead existed at any subsequent time, or that such homestead existed

March 5, 1892, the date of our judgment, nearly nine years after such homestead is said to have existed.

We believe we have established our positions impregnably, that the deed from Hancock to his wife was absolutely null and void for two reasons.

1. Because, by the common law then in force in Arizona, the husband could not make a deed, valid in law, direct to his wife.

2. Because such deed was prohibited by the statute restricting and prescribing the manner of conveyance of homesteads, and that the legal title therefore remained in Hancock, in the lots in question.

That Hancock and wife, having failed to preserve their homestead in the lots by filing and recording declaration of homestead upon them, as required by the Act of 1887, they lost their homestead in them, and when our judgment was rendered against Hancock March 5, 1892, it at once became a lien upon the lots, and our levy of execution on them and sale under that judgment, conveyed good title to the plaintiff; and the sheriff who made the sale was the only proper person to execute the sheriff's deed to us.

That the sheriff who made such sale made the deed we rely on to us, and that we commenced this action inside of three years from the date of that deed, and the possession of these lots having been shown to be in fact and in law in the defendant, Wm. A. Hancock, up to March 5, 1896, and such possession not being in law, adverse to our title, we are most clearly and unquestionably entitled to a reversal of this case.

Respectfully submitted,

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Of Counsel.